91-37

Supreme Court, U.S.
FILED
MAY 23 1991
OFFICE OF THE CLERK

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

BONNIE J. CLEMENCE, et als.,

Petitioners,

-vs-

CHARLES CLEMENCE AND DOUG CLEMENCE, AS REPRESENTATIVES OF THE ESTATE OF ROY A. CLEMENCE, DECEASED.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BONNIE J. CLEMENCE, Pro Se
LONTIE J. CLEMENCE, Pro Se
KAREN K. CLEMENCE, Pro Se

PETITIONERS

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Leawood, Kansas 66206
(913) 649-1721

QUESTIONS PRESENTED

I. Whether the 10th circuit's new no-publication, no-citation rule deprives all litigants within the 10th circuit of their 5th amendment right to due process of law, since the rule permits the court to arbitrarily and capriously strip some of its decisions of their precedential value, and be thus free of the binding force of its own legal precedent, to give different answers in selected cases within its jurisdiction, presenting the same legal questions and an indistinguishable set of facts?

II. Whether countervailing considerations of the no-publication, no-

citation rule's utility to judicial economy or administrative convenience can be held to superceed the requirements for due process of law, as mandated by the 5th amendment to the U.S. Constitution?

III. Whether the 10th circuit decision sought to be reviewed should be reversed, since -- where grantor was neither actually nor constructively before the court in the prior federal proceeding -- it's sanction of the lower courts' extension of the prior federal holding to preclude grantor's claim that her for value, general warranty deed is valid, constitutes an egregious deprivation of grantor's right to due process of law mandated by the 5th

Amendment to the U.S. Constitution?

IV. Whether the 10th Circuit decision sought to be reviewed, if not reversed, should have its value as a legal precedent restored, so that all courts within the 10th circuit shall be compelled -- by that portion of due process of law that requires that like cases be decided alike -- to give the same answers in all other cases within its jurisdiction presenting the same legal questions and an indistinguishable set of facts, as the 10th circuit did in the instant action?

V. Whether the decision sought to be reviewed conflicts with controlling legal precedent on the questions of law

controlling in this case: (1) Whether allegations specifically held to be reserved for consideration by another court can be precluded by the very holding that reserves them to the other court? and (2) Whether a deed determined to be voidable nevertheless remains valid, unless and until it is set aside.

LIST OF PARTIES

Petitioners-Plaintiff in this proceeding Bonnie J. Clemence, is herein referred to as "grantor", and Petitioners-Plaintiffs, Lontie J. Clemence and Karen K. Clemence, are herein referred to in the aggregate, as "transferees." Respondent-Defendant in this proceeding, Roy A.

Clemence, herein referred to as "husband," is now deceased; Charles R. Clemence and R. Douglas Clemence, as Representatives of the Estate of Roy A. Clemence, deceased.

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JURISDICTION

The order and judgment of the U.S. Court of Appeals was entered on February 22, 1991. The jurisdiction of this Court is invoked under 28 USC Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall be ... deprived of life, liberty, or property, without

due process of law ...

STATEMENT OF THE CASE

Jurisdiction over this proceeding in the bankruptcy court below is provided for by 28 USC Section 1334.

Petitioner, Bonnie Clemence, is plaintiff in this proceeding seeking declaratory judgment on the express terms and proper preclusive effects of a certain divorce decree and a certain prior federal determination. By her complaint for declaratory judgment, said petitioner-plaintiff, hereinafter referred to simply as "grantor," seeks to put the parties in knowledge of their rights and duties with

respect to a certain general warranty deed.

At its four corners, the deed is structurally sound, duly notarized, executed and recorded; it purports to be an absolute, for value, general warranty instrument of conveyance by which said its grantor effects the transfer of over 5,000 acres of Kansas real estate from the corpus of her inter vivos trust. Appendix 106-111 111. The terms of said grantor's inter vivos trust reserve unto she alone, as its sole grantor, the singular and absolute power and discretion to make any discretionary transfers from the corpus of her said trust, by either: (1) directing her mere, **ministerial**, co-trustees to do

so, or (2) by doing so herself and providing written notice to said trustees.

Grantor claims that her said deed is valid and precisely what it purports to be, notwithstanding the prior litigation brought against her, by her then husband in his effort to obtain some right or interest in or to the lands described therein.

This prior litigation ultimately resulted in a certain prior federal determination (Appendix 66-105 and 60-65) and a certain state court divorce decree. Appendix 26-59. Both expressly reserve -- each to the other -- the question of whether grantor's deed is invalid.

Nevertheless, grantor's former husband

thereafter filed Chapter 11 bankruptcy claiming to own the lands described in said deed, in contentious opposition to grantor's claim that her said deed is valid.

Grantor, having been thusly placed in a defensive posture, was forced to institute the instant action as a complaint for declaratory judgment by which she seeks to enforce the express terms and proper preclusive effects of the divorce decree against her former husband, to conclude his challenge to her claim that her deed is valid.

Husband thereupon filed a motion to dismiss the said complaint, urging

extension of the prior federal holding to grantor, to preclude grantor's claim that her deed is valid. In resisting the complaint via his motion to dismiss, husband asserted the prior federal holding precludes grantor from defending her claim that her deed is valid. Husband's motion to dismiss the complaint was thus, in substance, one for summary judgment on the merits of the entire question presented by the complaint.

In extending the prior federal holding to preclude grantor's claim that her deed is valid, the bankruptcy court thereby overruled not only the prior holding's express reservation, but also itself, on

its own previous ruling, that grantor was neither actually nor constructively before the court in the prior proceeding and so could not be bound on an inpersonam basis,

Grantor appealed the extension of the prior federal holding to preclude her claim that her deed is valid on the same grounds she had argued at the hearing on the motion to dismiss the complaint.

In affirming the bankruptcy court's order extending the prior federal holding to preclude grantor's claim that her deed is valid, the district court reversed itself on its own previous holding by which it had expressly reserved the allegations made by grantor's husband in the prior proceeding. Grantor thereupon appealed the district court's affirmance to the Tenth Circuit U.S. Court of Appeals.

The 10th circuit decision sought to be reviewed affirmed the lower courts' orders

for the same reasons the district court below had stated for its affirmance of the bankruptcy court's original extension of the prior federal holding, to preclude grantor's claim that her deed is valid.

In affirming the district court's extension of the prior federal holding to preclude grantor's claim that her deed is valid, the 10th circuit reversed itself on its own previous ruling that the prior

ARGUMENT

I. THE 10TH CIRCUIT'S NEW NO-PUBLICATION, NO-CITATION RULE DEPRIVES ALL LITIGANTS WITHIN THE 10TH CIRCUIT OF THEIR 5TH AMENDMENT RIGHT TO DUE PROCESS OF LAW, SINCE THE RULE PERMITS THE COURT TO ARBITRARILY AND CAPRIOUSLY STRIP SOME OF ITS DECISIONS OF THEIR PRECEDENTIAL VALUE, AND BE THUS FREE OF THE BINDING FORCE OF ITS OWN LEGAL PRECEDENT, TO GIVE DIFFERENT ANSWERS IN SELECTED CASES WITHIN ITS JURISDICTION, PRESENTING THE SAME LEGAL QUESTIONS AND AN INDISTINGUISHABLE SET OF FACTS?

The 10th circuit decision sought to be reviewed conflicts with controlling legal precedent on the questions of law

involved in this case since, contrary to said decision: (1) the prior federal determination that the deed is voidable does not make the deed invalid, so as to thereby make operable the otherwise inoperable provisional award of the lands described therein (2) the prior federal holding cannot preclude the allegations it specifically states it reserves for the consideration of the state divorce court.

III. THE DECISION SOUGHT TO BE REVIEWED SHOULD BE REVERSED, SINCE IT EXTENSION OF THE PRIOR FEDERAL HOLDING TO PRECLUDE GRANTOR'S CLAIM THAT HER FOR VALUE, GENERAL WARRANTY DEED IS VALID DEPRIVES GRANTOR OF HER 5TH AMENDMENT RIGHT TO DUE PROCESS OF LAW -- WHERE GRANTOR WAS NEITHER ACTUALLY NOR CONSTRUCTIVELY BEFORE THE COURT IN THE PRIOR PROCEEDING.

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall be ... deprived of life, liberty, or property, without due process of law ...

The 10th Circuit court's decision sought to be reviewed did not address plaintiffs-petitioners' assertion that the lower courts' extension of the prior federal determination to grantor, to preclude grantor's claim her deed is valid, deprives grantor of her 5th Amendment rights to due process of law.

The stated reason for the court's failure to address this most egregious constitutional deprivation is that court's conclusion, as it appears in a footnote in its decision:

> Plaintiffs attempted to file an amended complaint asserting that the first bankruptcy holding was invalid because the bankruptcy court did not have "in personam jurisdiction" over Bonnie, but

> the bankruptcy court did not permit the filing of the amended complaint. Consequently the argument apparently raised in this court concerning the issue of "inpersonam jurisdiction" is without foundation.

This is patently incorrect. While it is true that plaintiffs' second amended complaint did not get filed, their amended complaint did get filed. Plaintiffs filed their "Amended Complaint for Declaratory Judgment..." 1/ 13, 1986 by which they seek to enforce the express reservation contained in the prior federal holding; at page 6, paragraph 12. of said amended complaint, plaintiffs clearly assert:

> ... the district court which rendered its decision reflected in Exhibit C" did not obtain the inpersonam jurisdiction over Bonnie .... requisite to bind her

or bar her said claim that said deed is valid as to her.

Even aside from its express reservation of allegations, there can be no question that it does not preclude grantor's claim that her deed is valid. The prior federal determination itself specifically states that Bonnie Clemence is the grantor, that she was not a party to the prior federal proceeding and that she was not represented in that action. Appendix 60-103

This court may consider all issues properly raised below. FTC v. Travelers Health Assn. 1960, 80 S.Ct, 717, 362 U.S. 293, 4 L.Ed.2d 724; Marconi Wireless Tel.

Co. of America v. Simon, 1918, 38 S.Ct. 275, 277, 246, U.S. 46, 57, 62 L. Ed. 568. So a proper foundation does exist for this court to fully address the issue of the prior court's want of inpersonam jurisdiction over grantor for purposes of determining the validity of her for value, general warranty deed.

The reason the prior federal determination cannot be extended to grantor, to preclude her claim that her deed is valid, is that husband had failed to join her as a party to the prior proceeding. For to extend such a judgment and make it binding upon the one who was neither actually, nor constructively before

the court, would constitute a denial of due process as to that person. 3A Moore's Federal Practice, 19.01-[2], p.19-20; Hansberry v. Lee, (1940) 311 US 32, 61 S Ct 115, 85 L ed 22, 132 ALR 741. American Triticale Inc. v. Nytco Services Inc., (CA 9th, 1981) 664 F2d 1136. 1b Moore's Federal Practice, 0.410[3], p. 386-389. Parklane Hosiery Co. v. Shore, (1979) 439 US 322, 99 S Ct 645, 58 L ed2d 549; Pennoyer v. Neff, (1877) 95 US 714, 24 3d2d 565. Such a judgment is not as to that person, entitled to full faith and credit. Western Union Telegraph Co. v. Commonwealth of Pennsylvania, (1961) 368 US 71, 82 S Ct 199, 7 L ed2d 139.

And it is but a short step to say that, since the court in the prior proceeding was without power to legally affect grantor's rights and liabilities her liability on her covenant of further assurances and her liability to Roy's marital claim against her) it was therefore without "jurisdiction" (i.e. power) to make a determination as to the validity of grantor's claim that her deed to children is valid (which, of course, is why the prior federal determination does not purport to determine the validity of her deed to children but to instead, expressly reserve the question to the state divorce court.

Grantor's absence as a party in the prior proceeding was noticed by the court in that proceeding only at the rest of her husband's case in chief against her. At that point the court ruled, sua sponte, that grantor was not a party to the prior proceeding and that it therefore could not bind her, to preclude the question of whether her deed is valid. The prior federal determination states that grantor was not a party and was not represented in that action. Appendix 68. This is further evidenced by the following excerpt from the trial had in the prior proceeding.

> Court: Well, at this point, **I have a problem in this case and that is that Roy Clemence's case never served Bonnie**

Clemence. She is not a party-defendant."

Mr. Hinkle: [T]he Court said that that would not be a problem, that the Court could proceed to determine the validity of this deed as to Karen and Lontie, without Bonnie Clemence being a party. It is on that basis that we have proceeded.

Court: I am not sure that I recall that.

Mr. Hinkle: "I specifically stated to the Court that .... we were ready to go forward and get jurisdiction on Bonnie in this Court if it was going to be a problem. And the court assured us that would not be a problem, that the court could go ahead and decide the validity of this deed
as to these debtors ....

Court: **... I certainly don't recall that I ever said that I would be able to bind a non-party --**

Mr. Hinkle: .... Let's assume that Bonnie had died in the meantime. You couldn't get process on her. I think

the Court can still consider her conduct as shown by the evidence and decide the validity of that deed.

Court: .... I am not sure that I can give you the relief you actually sought .... In other words, you might be able to go back from the kids to Bonnie's Trust, which for the divorce purposes is all you need anyway .... If I get it out of this estate, it then becomes some other court's problem as to whose property it is.

Mr. Hinkle: .... I think we need to be very, very careful that everybody knows [w]e have invested a terrific amount of time and money, and I don't want us to do something precipitously that is only going to mean we are going to have to come back and have to do the whole thing all over again, particularly when we were assured that we were proceeding in the right avenue and that we all had concerns about our procedure. And the procedures have been more or less a morass in this since the outset, and we have proceeded in good faith that this Court could make that determination."

Court: "I don't know that I ever told

you that you don't have to serve the parties in order to have them personally represented. I don't think that I said that. I certainly would never recall telling anyone that you don't have to have a party defendant named and served .... As to any time I would have ever told you that your pleadings are all fine, that you have done everything necessary. I don't think that is my duty to tell you that and I doubt that I would have made such a representation .... I can read the record of June 29, or whatever it is, but I would be surprised if I assured you that you had obtained all of the proper parties, because I doubt that I would bring it up on my own until such time as I thought it was appropriate ... I simply want to bring want to bring to your attention that I don't believe that Bonnie is a party and that nothing here is going to have any effect and it may muddy the water a little bit as to what my ability to do certain of the transactions might be.

While grantor is an indispensable party to any determination of the validity

of her deed, she was not necessary to the prior federal determination's purely quasi in rem determination of ownership and consequent judicial attachment of the lands described in her deed -- whereby said lands were sent to the jurisdiction of the divorce court **"in light of"** the allegations made by Roy to answer to the allegations against her in the then pending divorce action.

And the prior federal determination therefore correctly concluded that, in the prior federal proceeding, "[n]o error was committed by proceeding in the absence of Bonnie Clemence as a party."

II. CONTRARY TO THE CIRCUIT DECISION,

SINCE BOTH THE DIVORCE DECREE AND THE PRIOR FEDERAL DETERMINATION EXPRESSLY RESERVE -- EACH TO THE OTHER -- THE QUESTION OF WHETHER GRANTOR'S DEED IS VALID, IT IS AXIOMATIC THAT NEITHER PRECLUDE GRANTOR'S CLAIM THAT HER DEED IS VALID; AND THAT HUSBAND IS THEREBY PRECLUDED.

The ultimate outcome of the prior litigation, per the express terms and proper preclusive effects of both the prior federal holding and the divorce decree's provisional award, is favorable to grantor -- in so far as her claim that her deed is valid is concerned.

This, since both the prior federal holding and the divorce decree expressly reserve -- each to the other -- the question of whether grantor's deed is

invalid. It is axiomatic that allegations reserved by the prior federal determination's holding are not precluded by that holding. For, to hold that allegations reserved by the holding are precluded by that holding, is to defeat the very purpose of the reservation -- to permit another court the opportunity to consider the merits of the questions so reserved. The lower courts' extension of the prior federal determination to grantor to preclude grantor's claim that her deed is valid therefore conflicts with reason.

IV. CONTRARY TO THE LOWER COURTS, THE PRIOR FEDERAL DETERMINATION THAT THE DEED IS VOIDABLE DOES NOT PRECLUDE GRANTOR'S CLAIM THAT HER DEED IS VALID SO AS TO SATISFY THE DIVORCE DECREE'S PROVISIONAL AWARD, SINCE A DEED DETERMINED TO BE VOIDABLE IS NEVERTHELESS VALID,UNLESS AND UNTIL IT IS SET ASIDE, Harrison v. Craddock, Tex.Civ.App., 178 S..W.2d 296, 301.

Since the prior federal determination

does not set the deed aside, the divorce decreee's provisional award -- by its own specific and unequivocal terms -- therefore has no bearing on the lands described res judicata, by the judgment to be entered therein.

Harrison instructs that the only difference between a perfectly valid deed and voidable deed is that the voidable deed may be set aside at some time in the future. Id. Since a voidable deed may never be set aside, it therefore cannot be regarded as invalid. So while the prior federal determination did establish grantor's deed as voidable, it did not determine it to be invalid, for purposes of the divorce decree's provisional award.

The burden falls on the party asserting preclusion to establish those facts which are necessary for preclusion.

See Moore v. United States, 344 F.2d 588 (D.C. Cir. 1965). Grantor sustains this burden by showing to the court, that the prior federal holding expressly reserves all allegations made in the prior action. Allegations so reserved are not precluded. Hence, the prior federal holding does not preclude grantor's claim that her for value, general warranty deed is valid.

The party contending that a prior judgment is binding in a subsequent suit has the burden of proving that the [illegible] See Moore Federal Practice at 0.408[1] (Res Judicata/Federal Pleading), citing: Russell v. Place (1876) 94 US 606, 24 L ed 214; Hayles v. Randall

Even though the divorce decree did reserve the question of whether grantor's deed is invalid to the federal court, it nevertheless has effect under the doctrine

of res judicata, to ultimately preclude that question.

This, since husband had no right or interest in or to the lands described in the deed independent of his marital claim against grantor. As the prior federal determination specifically states, he had been allowed to proceed in the prior federal proceeding solely on the basis of his marital claim against grantor. In precluding husband's marital claim against grantor, the divorce decree therefore has effect under the doctrine of res judicata, to preclude husband's challenge to grantor's claim her deed is valid.

CONCLUSION

For the reasons above stated, petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding, to review the Tenth Circuit's use of its new no-publication, no-citation rule in this case; to strike down the rule and either reverse the decision or restore its value as a legal precedent.

_____
Bonnie J. Clemence, Pro Se

_____
Lontie J. Clemence, Pro Se

_____

Karen K. Clemence, Pro Se

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

(FILED 2-22-91, U. S. COURT OF APPEALS
TENTH CIRCUIT, Robert L. Hoecker, Clerk)

IN RE:
LONTIE J. CLEMENCE and KAREN K. CLEMENCE, Individually and in their severable capacities as stockholders of and trustees for "THE BONNIE J. CLEMENCE, TRUST, UTA 7/25/84"; BONNIE J. CLEMENCE, individually and in her capacity as stockholder of "The Bonnie J. Clemence Trust, UTA UTA 7/25/84,"

Plaintiffs-Appellants,

v.

ROY ARTHUR CLEMENCE, conservatee/ debtor; CHARLES R. CLEMENCE AND R. DOUGLAS CLEMENCE, co-conservators for Roy A. Clemence,

Defendants-Appellees.

No. 90-3049
(D.C. No. 86-4091-R)
(D. Kansas)

ORDER AND JUDGEMENT*

Before MCKAY, MOORE, and BRORBY, Circuit Judges.

*This order and judgement has no precential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

After examing the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. p. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

This is an appeal from a judgement of the District Court of the District of Kansas sitting as an appellate court in bankruptcy. The sole issue is whether the bankruptcy court correctly dismissed an adversary proceeding brought to determine whether 5000 acres of real property was that of the plaintiffs or that of the estate. The district court

upheld the bankruptcy judgement that the issue had been resolved in prior actions, and we affirm the district court.

Plaintiff, Bonnie J. Clemence, is the mother of plaintiffs Lontie J. Clemence and Karen K. Clemence. Roy Clemence, who bankruptcy estate is a party defendant in this action, was the husband of Bonnie and the father of Lontie and Karen. The dispute here is whether Lontie and Karen are the owners of the real property as a result of a deed from Bonnie to them.

Bonnie executed a general warranty deed to Lontie and Karen dated May 19, 1982, purporting to convey the 5000 acres to them as a gift. The deed was not recorded until April 25, 1983. In the intervening period, a number of consequential events occurred.

First, and perhaps most important in the chain of events, in June 1982, Roy filed an action in state court first seeking separate maintenance and later a divorce from Bonnie. From what we can glean of the prolix briefs and the record, there is no dispute that the state court had jurisdiction over the properties of Roy and Bonnie and had authority to allocate their interests in those properties in accordance with state law.

Thereafter, on April 18, 1983, Lontie and Karen filed a chapter 11 proceeding in the District of Kansas. In that proceeding, the bankruptcy judge ultimately determined that Bonnie did not have donative intent to convey the property to Lontie and Karen when she executed the deed. He consequently held there was no "effective transfer before

June 10, 1982," the date the state court acquired jurisdiction in the action between Roy and Bonnie. (1) He concluded the property was owned by "the Bonnie Clemence Trust and not the debtors [Lontie and Karen] in this chapter 11 proceeding." (Emphasis added.) The court then returned the property "to the jurisdiction of the state court to be divided in the divorce proceeding pursuant to the state court's authority." That judgement was appealed to the district court, which affirmed the bankruptcy court, and to this court which summarily affirmed the district court.

After the entry of the judgement of the bankruptcy court, the state court entered a decree of divorce. In that

(1) The date is further significant because from that time Bonnie had been enjoined by the state court from conveying any interests in property.

decree, the state court awarded the 5000 acres to Roy,

> subject, however, to the final determination yet to be made by the United States bankruptcy Court for the District of Kansas concerning the validity of a certain deed executed on the 19th day of May, 1982, by the parties as Trustees of the Bonnie J. Clemence Trust purporting to convey to Karen K. Clemence and Lontie J. Clemence certain tracts of land situated in Dickinson County and Ottawa County, Kansas . . . . Should the aforesaid deed be finally determined to be invalid it is the finding of this Court that the ownership of all lands described therin as well as the other lands described . . . should be set over to the Plaintiff [Roy] as his sole and separate property, free and clear of all claims of the Defendant. Should said deed be finally determined to be valid then this finding shall have no bearing on the lands described therein.

It is not clear in the record before us, but we presume at the time of the decree the state court was unaware of the judgment of the bankruptcy court holding the purported transfer to Lontie and

Karen ineffective. We have no doubt, however, that the state court intended to defer to the bankruptcy court's determination of whether Bonnie's deed effectively conveyed the 5000 acres to Karen and Lontie. We are equally certain that the state court intended to award the 5000 acres to Roy if the bankruptcy court held that transfer ineffective.

Succeeding the entry of the divorce decree by some eight months, Roy filed the bankruptcy proceeding from which this appeal emerged. In that proceeding, plaintiffs filed a pro se complaint, individually and "as fairly representative of the body of 'Stockholders' of the Bonnie J. Clemence Trust" seeking a declaratory judgment that the 5000 acres "do not constitute property of [Roy's bankruptcy] estate - unless and until the said deed be

adjudicated to be invalid as to Bonnie." Again, while the prolixity of the complaint obscures the clarity of its purpose, it appears that plaintiffs contended that because the bankruptcy court did not pronounce the word "invalid" when it held the purported conveyance from Bonnie to Lontie and Karen "ineffective," the divorce decree operated to vest title in the 5000 acres in Bonnie. (2)

Roy, as debtor, filed a motion to dismiss the complaint for failure to state a claim. Roy asserted the issue of

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(2) Plaintiffs attempted to file an amended complaint asserting that the first bankruptcy holding was invalid because the bankruptcy court did not have "in personam jurisdiction" over Bonnie, but the bankruptcy court did not permit the filing of the amended complaint. Consequently, the argument apparently raised in this court concerning the issue of "in personam jurisdiction" is without foundation.

the validity of the deed had been resolved against Karen and Lontie, and that holding was binding. After hearing the motion the bankruptcy court concluded the issues "have already been determined by this Court and therefore are barred by res judicata and collateral estoppel." The motion to dismiss was granted.

On appeal, the district court affirmed. The court held that contrary to plaintiffs' assertion, it did determine Bonnie's deed invalid. The court stated:

> While the court did not explicitly state that the deed was invalid, the court held the deed was ineffective (or invalid) to transfer interest in the land to Karen and Lontie Clemence because there was an absence of donative intent, delivery and acceptance--the essential elements of a gift. This holding satisfied the condition in the divorce decree because it established the ownership of the land at the time of the decree.

We agree with this ruling. Plaintiffs' contention is utterly frivolous.

AFFIRMED. Mandate shall issue forthwith.

Entered for the Court

John P. Moore
Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

(FILED 1-12-90, 2:31 PM)

IN RE:	)
	)
LONTIE J. CLEMENCE and KAREN K. CLEMENCE, Individually and in their severable capacities as stockholders of and trustees for "THE BONNIE J. CLEMENCE TRUST, UTA 7/25/84"; BONNIE J. CLEMENCE, Individually and in her capacity as stockholder of "THE BONNIE J. CLEMENCE TRUST, UTA 7/25/84",	)
	)
Plaintiffs/Appellants,	)
	)
vs.	)
	)
ROY ARTHUR CLEMENCE, Conservatee/ Debtor; CHARLES R. CLEMENCE and R. DOUGLAS CLEMENCE, Co-Conservators for Roy A. Clemence,	)
	)
Defendants/Appellees.	)

Case No. 86-4091
(85-40164)
Adv. Proceeding (85-0278)

O R D E R

This is a long-pending bankruptcy appeal. Appellants Bonnie J. Clemence, Lontie Clemence and Karen Clemence filed

an adversary proceeding asking for declaratory judgement. Appellants sought a declaration from the Bankruptcy Court that certain lands described in a general warranty deed dated May 19, 1982 are not property of the estate of the debtor, Roy A. Clemence, until the deed is adjudicated invalid.

The bankruptcy court dismissed the adversary proceeding on the grounds that "the claims and issues presented in plaintiff's Complaint have already been determined by this Court and the United States District Court for the District of Kansas and therefore are barred by res judicata and collateral estoppel," The appellees have asked for summary affirmance on the same basis, noting, in addition, that the Tenth Circuit Court of Appeals affirmed the action of this District Court and the Bankruptcy Court.

We have reviewed the lengthy materials filed in this matter, including the appellants' brief, statements of the issues, and the transcripts of the proceedings before the Bankruptcy Court. Of course, we are familiar with the prior decision which was used by the Bankruptcy Court as grounds for dismissal of this matter. Nevertheless, we made another review of that decision, as well as the divorce decree which has been made part of the record and which is a significant part of appellants' argument.

The prior decision was rendered in a bankruptcy and adversary proceeding involving the same parties. The issue was whether Karen Clemence and Lontie Clemence owned the same land at issue here by reason of a general warranty deed dated May 19, 1982 and signed by their mother, Bonnie Clemence, and their

father, Roy Clemence. This court adopted the following findings of the Bankruptcy Judge:

> The transfer of the real estate to Karen and Lontie on May 19, 1982 was not an effective gift, because it lacked, and Karen and Lontie failed to prove, the requisite elements of a gift. Even if the burden of proof in this case was on Roy and the creditors, as Karen and Lontie argue, the Court would hold that Roy and the creditors have proved that a valid gift was not made. The Court holds there was no intent to make a transfer, nor was there an effective transfer before June 10, 1982. At that point, Bonnie was enjoined from transferring the property in any manner by the restraining order issued by the state court judge in the domestic relations actions. Accordingly, the Court holds that the owner of the real estate is the Bonnie Clemence Trust and not the debtors in this chapter 11 proceeding, Karen and Lontie Clemence. The Court makes no determination of the allegations of diminished capacity of Roy, fraud perpetrated on Roy, nor undue influence exercised to Roy's detriment. By this Court's holding today, the property is returned to the jurisdiction of the state court to be divided in the divorce proceeding pursuant to the state court's

> authority, in light of the agreements, wills and trusts since 1954, the statutory and case law factors, and in light of the allegations made by Roy.

Before this court adopted the above findings and while the adversary proceedings were pending, a state court in the divorce case between Roy and Bonnie Clemence issued an order dividing property so that certain land would go to Roy Clemence on the condition described as follows:

> "subject . . . to the final determination yet to be made by the United States Bankruptcy Court for the District of Kansas concerning the validity of a certain deed executed on the 19th day of May, 1982, by the parties as Trustees of the Bonnie J. Clemence Trust purporting to convey to Karen K. Clemence and Lontie J. Clemence certain tracts of land . . . Should the aforesaid deed be finally determined to be invalid it is the finding of this Court that the ownership of all lands described therein . . . should be set over to [Roy Clemence] . . ."

Appellants contend that this court never decided that the deed was invalid, and therefore Roy Clemence cannot claim ownership of the lands described in the deed. While the court did not explicitly state that the deed was invalid, the court held the deed was ineffective (or invalid) to transfer interest in the land to Karen and Lontie Clemence because there was an absence of donative intent, delivery and acceptance--the essential elements of a gift. This holding satisfied the condition in the divorce decree because it established the ownership of the land at the time of the decree.

Hence, appellants' claim in this proceeding that the divorce decree bars Roy Clemence's claim to the land has already been decided by the operation of this court's decision and the divorce

decree. This court held that the land belonged to the Bonnie Clemence Trust. The divorce decree then placed the land in Roy Clemence's ownership. The Bankruptcy Court was correct in making this purely legal determination upon a motion to dismiss.

The dismissal of the adversary proceeding is affirmed. This action is taken upon a full consideration of the matters filed before this court--not as a summary action upon appellees' motion. A copy of this order shall be transmitted to the Clerk of the Bankruptcy Court.

IT IS SO ORDERED.

Dated this 12th day of January, 1990 at Topeka, Kansas.

S/Richard D. Rogers
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

(FILED U. S. COURT OF APPEAL TENTH CIRCUIT 4-28-87, Robert L. Hoecker, Clerk)

(FILED 4-30-87 Ralph L. DeLoach, Clerk)
By S/_____ Deputy

IN RE	)
KAREN KAY CLEMENCE AND LONTIE JOE CLEMENCE,	)
Debtors,	)
CITIZENS STATE BANK OF ABILENE; ROY DOUGLAS CLEMENCE and CHARLES ROY CLEMENCE,	)
Plaintiffs-Appellees,	)
v.	)
KAREN KAY CLEMENCE and LONTIE JOE CLEMENCE,	)
Defendants-Appellants.	)

No. 84-2079
(D.C. No. 84-4256)
(D. Kan.)

A true copy

Teste

Robert L. Hoecker

Clerk, U. S. Court of
Appeals, Tenth Circuit

By S/Marie Talamas
Deputy Clerk

ORDER AND JUDGMENT

Before ANDERSON and BARRETT, Circuit Judges, and Thompson, District Judge.*

---

*The Honorable Ralph G. Thompson, Chief Judge, United States District Court for the Western District of Oklahoma, sitting by designation.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that the oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.8(c) and 27.1.2. The cause is therefore ordered submitted without oral argument.

Defendants-debtors appeal from a district court order adopting the

bankruptcy judge's decision in favor of plaintiff-appellant in this adversary proceeding brought to determine debtors' rights in certain Kansas real estate.

We hold that the district court correctly exercised jurisdiction over the parties and subject matter and followed proper procedures in its review of the case. We also concur in the detailed findings and thorough analysis of the merits by the bankruptcy judge and district court.

The judgment of the United States District Court for the District of Kansas is AFFIRMED.

The mandate shall issue forthwith.

ENTERED FOR THE COURT
PER CURIAM

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

(FILED 1-30-86, Russell L. Brenner, Clerk, U. S. Court of Bankruptcy
By_____Deputy

IN RE:

ROY ARTHUR CLEMENCE, CONSERVATEE/DEBTOR; CHARLES R. CLEMENCE AND ROY D. CLEMENCE, CO-CONSERVATORS FOR ROY A. CLEMENCE
Case No. 85-40164

IN RE:

LONTIE J. CLEMENCE AND KAREN K. CLEMENCE, INDIVIDUALLY AND IN THEIR SEVERABLE CAPACITIES AS STOCKHOLDERS OF AND TRUSTEES FOR "THE BONNIE J. CLEMENCE TRUST, UTA 7/25/84"; BONNIE J. CLEMENCE, INDIVIDUALLY AND IN HER CAPACITY AS STOCKHOLDER OF "THE BONNIE J. CLEMENCE TRUST UTA 7/25/84"

Plaintiffs,

vs. Adv. Proceeding No. 85-0278

ROY ARTHUR CLEMENCE, CONSERVATEE/DEBTOR; CHARLES R. CLEMENCE AND R. DOUGLAS CLEMENCE, CO-CONSERVATORS FOR ROY A. CLEMENCE,

Defendants.

ORDER

Now on this 24th day of January, 1986, defendants Roy Arthur Clemence, conservatee-debtor and Charles R. Clemence and R. Douglas Clemence, co-conservators' Motion to Dismiss came on for hearing. The defendants appeared by counsel, Marta Fisher Linenberger of Goodell, Stratton, Edmonds and Palmer; plaintiffs appeared by Karen K. Clemence and Bonnie J. Clemence.

Upon hearing statements of the parties and upon consideration of the evidence, the Court finds that defendants' Motion to Dismiss should be granted on the grounds that the claims and issues presented in plaintiff's Complaint have already been determined by this Court and therefore are barred by res judicata and collateral estoppel.

IT IS THEREFORE ORDERED that plaintiffs' complaint and amended complaints in this matter are dismissed with prejudice.

IT IS SO ORDERED.

S/James A. Pusateri
United States Bankruptcy Judge

APPROVED BY:

S/Marta Fisher Linenberger
GOODELL, STRATTON, EDMONDS & PALMER
215 E. Eighth Avenue
Topeka, KS 66603-3999
913/233-0593

1/30/86 File-stamped copy mailed by First Class Mail to:
Lontie J. Clemence, Route 4, Abilene, KS 67410
Karen Kay Clemence, Satilite Office, Suite 215, 7740 Metcalf, Overland Park, KS 66204
Bonnie J. Clemence, 3012 W. 89th Terrace, Leawood, KS 66206
Marta Fisher Linenberger, 215 E. 8th, Topeka, KS 66603-3999
Max M. Hinkle, 306 NW Second, Abilene, KS 67410
Office of Ass't U. S. Trustee, 401 N. Market, Room 501, Wichita, KS 67201
Roy Arthur Clemence, Route 4, Abilene, KS 67410
S/_____Deputy Clerk

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re:	)
	)
ROY ARTHUR CLEMENCE, (No.85-40164)	)
Charles R. Clemence and	)
R. Douglas Clemence, Conservators,	)
	)
Debtor.	)
	)
LONTIE J. CLEMENCE and	)
KAREN K. CLEMENCE, Individually	)
and in their severable capacities	)
as stockholders of and trustees	)
for "The Bonnie J. Clemence	)
Trust, UTA 7/25-84,"	)
	)
Plaintiff,	)
	)
vs. (No. 85-0278)	)
	)
ROY ARTHUR CLEMENCE, Conservatee/	)
debtor; Charles R. Clemence and	)
R. Douglas Clemence, co-conservator	)
for Roy A. Clemence,	)
	)
Defendant.	)
	)
(Adversary Proceeding)	

ORDER NUNC PRO TUNC AND
ORDER DENYING MOTION FOR REHEARING

Now on this 6 day of March, 1986, the Court determines that its order dated January 24, 1986 to reflect the true

facts in this case, should be amended to read as follows:

"Upon hearing statements of the parties and upon consideration of the evidence, the court finds that defendants' Motion to Dismiss should be granted on the grounds that the claims and issues presented in plaintiff's Complaint have already been determined by this Court and the United States District Court for the District of Kansas and therefore are barred by res judicata and collateral estoppel."

The Court further finds that the plaintiff's motion for rehearing should be denied.

IT IS SO ORDERED.

S/JAMES A. PUSATERI
Bankruptcy Judge

IN THE DISTRICT COURT OF DICKINSON COUNTY, KANSAS

(FILED 6-20-84, 2:10 PM)

ROY ARTHUR CLEMENCE,)
)
Plaintiff,)
)
vs.)
)
)
BONNIE J. CLEMENCE,)
)
Defendant.)

Case No. 82 D 63

DECREE OF DIVORCE

Now, on this 19th day of June, 1984, the above-styled-cause come regularly on for trial of the issues in controversy between the Plaintiff, Roy Arthur Clemence, and the Defendant, Bonnie J. Clemence, said Plaintiff and Defendant being hereinafter referred to collectively as the "parties" and individually as the "Plaintiff" and the "Defendant". The Plaintiff appears

personally and by his attorney, Max M. Hinkle of Lehman, Guilfoyle & Hinkle of Abilene, Kansas, but the Defendant appears not, neither in person nor by an attorney.

WHEREUPON, Plaintiff announces that he is ready to proceed to trial, and the Court, finding that this matter was set for trial on this date ninety (90) days ago and at a time when the Defendant was represented by legal counsel and that this setting was agreed to by Defendant's counsel prior to his withdrawing from the case, and that the Defendant has made no request for a postponement of the same, further finds that the trial should proceed as ordered in the absence of the Defendant.

WHEREUPON, Plaintiff presents his evidence and rests, and no evidence is presented on behalf of the Defendant; and

the Court, having heard the evidence and being advised in the premises, finds as follows:

I. That the Court has jurisdiction in personam over both the Plaintiff and the Defendant and has jurisdiction of the subject matter hereof and that proper venue lies with this Court.

II. That the Plaintiff was a bona fide resident of the state of Kansas for more than the sixty (60) days next preceding the filing of his petition for divorce herein; that the parties were united in marriage on the 21st day of May, 1954, at Abilene in Dickinson County, Kansas and have been at all times since that time and now are husband and wife.

III. That there are no minor children of this marriage.

IV. That differences have arisen between the parties of such a nature and to such an extent that it is impossible for them to live together harmoniously as husband and wife, and that a decree of divorce on the grounds of incompatibility should be granted to the Plaintiff from the Defendant.

V. That neither party should have judgment against the other for alimony.

VI. That the property of the parties should be divided between them in the manner as follows:

A. The Plaintiff should have as his sole and separate property, free and clear of all claims of the Defendant, the following:

1. All that real estate listed and enumerated on Exhibit A annexed hereto, subject, however, to the final determination yet to be made by the

United States Bankruptcy Court for the District of Kansas concerning the validity of a certain deed executed on the 19th day of May, 1982, by the parties as Trustees of the Bonnie J. Clemence Trust purporting to convey to Karen K. Clemence and Lontie J. Clemence certain tracts of land situated in Dickinson County and Ottawa County, Kansas, which are listed among those shown on the aforesaid Exhibit A. Should the aforesaid deed be finally determined to be invalid it is the finding of this Court that the ownership of all lands described therein as well as the other lands described in the aforesaid Exhibit A should be set over to the Plaintiff as his sole and separate property, free and clear of all claims of the Defendant. Should said deed be finally determined to

be valid then this finding shall have no bearing on the lands described therein.

2. All interest of the parties in and to a certain contract for the sale of real estate entered into by and between Plaintiff and Defendant as Sellers and Samuel W. Kincaid and Georgia L. Kincaid as Buyers, said contract being dated the 4th day of April, 1979, and escrowed at the Assaria State Bank, Assaria, Kansas.

3. All interest of the parties in and to a certain contract for the purchase of real estate entered into by and between the Plaintiff and Defendant as Buyers and Robert F. Patton and Ida Mae Patton as Sellers, said contract being dated the 4th day of February, 1976, and escrowed at the Solomon State Bank, Solomon, Kansas.

4. All interest of the parties in and to a certain contract for the purchase of real estate entered into by and between the Plaintiff and Defendant as Buyers and Otis Rollins Clemence and Beulah Clemence as Sellers, said contract being dated the 11th day of January, 1974, and escrowed at the Citizens Bank and Trust Co., Bailene, Kansas.

5. All interest of the parties in and to a certain contract for the purchase of real estate entered into by and between the Plaintiff and Defendant as Buyers and Beulah Luella Clemence as Seller, said contract being dated the 17th day of August, 1977, and escrowed at the Citizens Bank and Trust Co., Abilene, Kansas.

6. All interest of the parties in and to a certain contract for

the purchase of real estate entered into by and between the Plaintiff and Defendant as Buyers and Beulah Luella Clemence as Seller, said contract being dated the 17th day of August, 1977, and the Addendum to said Contract being dated the 20th day of July, 1978, and escrowed at the Citizens Bank and Trust Co., Abilene, Kansas.

7. All interest of the parties in and to a certain contract for the purchase of real estate entered into by and between the Plaintiff and Defendant as Buyers and Beulah Luella Clemence as Seller, said contract being dated the 17th day of August, 1977, and escrowed at the Citizens Bank and Trust Co., Abilene, Kansas.

8. All farm and livestock tools, equipment and supplies heretofore

belonging to either or both of the parties.

9. All farm machinery belonging to either or both of the parties, including but not limited to the following:

a) One (1) Waldon dual drill hitch;

b) One (1) Farmhand tub grinder;

c) One (1) 8' Speed mover;

d) One (1) John Deere 158 loader;

e) Two (2) pickup beds;

f) Two (2) truck feed boxes.

10. All motor vehicles belonging to either or both of the parties, except two (2) Cadillac sedans, including but not limited to the

following:

a) One (1) 1980 Chevrolet 1/2 Ton Four Wheel drive pickup;

b) One (1) 1975 GMC 1/2 Ton pickup truck;

c) One (1) 1969 Chevrolet two ton truck (wrecked)

d) One (1) 1966 Chevrolet two ton truck (motor out);

e) One (1) 1965 Ford two ton truck;

f) One (1) 1957 Chevrolet two ton truck (registered);

g) One (1) 1957 Chevrolet two ton truck (unregistered);

h) One (1) 1974 Chevrolet half ton four-wheel drive;

i) One (1) 1973 Chevrolet 3/4 ton truck (shop

truck);

j) One (1) 1974 Chevrolet 1/2 ton pickup truck (inoperable)

k) One (1) 1965 Chevrolet truck (tractor truck);

l) One (1) 1965 El Camino;

m) One (1) 1965 El Camino;

n) One (1) 1950 Chevrolet one ton truck.

11. Life insurance policies issued on the life of the Plaintiff, as follows:

a) Victory Life Insurance policy no. 586603;

b) Manhattan Life Insurance policy no. 756034;

c) New York Life Insurance policy no. 36,001,732;

d) New York Life Insurance policy no. 27,043,163;

e) New York Life Insurance policy

no. 27,018,894;

f) New York Life Insurance policy no. 27,018,895.

12. All grain, hay and silage now in storage belonging to either or both of the parties, including but not limited to the following:

a) 799.92 bushels of 1977 wheat in the Abilene Coop. Assoc., Abilene, Kansas;

b) 679.00 bushels of 1979 wheat in the Abilene Coop. Assoc., Abilene, Kansas;

c) 156 bushels of wheat in the Lincoln Coop, Lincoln, Kansas.

13. All shares of stock now owned by the parties or either of them in the following farm cooperatives:

a) The Farmers Coop. Assoc., Talmage, Kansas;

b) The Solomon Coop. Assoc., Solomon,

Kansas;

c) The Abilene Coop. Assoc., Abilene, Kansas.

14. All reserved patronage dividends now held for the account of the parties or either of them by the following farm cooperatives:

a) The Farmers Coop. Assoc., Talmage, Kansas;

b) The Solomon Coop. Assoc., Solomon, Kansas;

c) The Abilene Coop. Assoc., Abilene, Kansas.

15. All shares of stock now issued by the Federal Land Bank of Wichita, Kansas, to the parties or either of them.

16. Two (2) quarter horses.

17. All those proceeds now held by the Clerk of this Court deriving from the sale or sales of cattle

pursuant to previous orders made herein, said proceeds together with interest accruing thereon to be paid to the Plaintiff forthwith.

18. That certain promissory note in the principal sum of $28,000.00 issued by Lontie J. Clemence to the parties on or about the 16th day of October, 1979, and the first real estate mortgage securing the same, said mortgage being dated the 16th day of October, 1979, and recorded on December 28, 1979, in Mortgage Book 168, Page 517 in the office of the Dickinson County Register of Deeds.

19. All that ornamental iron presently stored at the main house at Sand Springs.

20. All interest of the parties or either of them in those proceeds from the 1983 wheat crop

impounded and now held by the Clerk of the United States Bankruptcy Court together with all interest accruing thereon.

21. All of the interest of the parties or either of them in government payments under 1983 farm programs including all grain entitlements under 1983 PIR contracts pertaining to any of the lands described above.

22. All of the interest of the parties or either of them in 1984 crops now growing or heretofore harvested from any of the lands described above.

23. All of the interest of the parties or either of them in pasture rentals accrued or accruing under 1983 and current leases of any of the real estate listed above.

24. All claims against Lontie J. Clemence and Karen K. Clemence

for reimbursement for crops harvested in 1983 and 1984 and government program payments made in connection therewith and for pasture rentals for 1983 and 1984, all with respect to any of the real estate described in Exhibit A annexed hereto.

25. All counterclaims and crossclaims filed by the parties or either of them in this Court in Case No. 80 C 205, Ralph M. Stoneberger and Debra Stoneberger vs. Roy A. Clemence and Bonnie J. Clemence, et al.

26. All capital credits held for the account of either or both of the parties by D.S. & O. Rural Electric, Solomon, Kansas.

27. Plaintiff's checking account in the Citizens Bank and Trust Co, Abilene, Kansas.

B. The Defendant should have as her sole and separate property, free and clear of all claims of the Plaintiff, the following:

1. All household goods and antiques belonging to the parties or either of them, but not including the ornamental iron above awarded to the Plaintiff.

2. All cash presently in her possession.

3. Cemetery lots in Salina, Kansas.

4. Two (2) Arabian horses.

5. The real estate situated in Saline County, Kansas, described as follows:

a) Lot Three (3), Elm Grove Addition, Salina, Kansas;

b) The South Six Feet (6') of Lot Five (5), Block Seventeen (17), South Park Addition, Salina, Kansas;

c) A triangular tract adjacent to and North of Lots three (3), Four (4) and Five (5), Block Eleven (11), Chicago Addition plus the adjacent vacated Grand Blvd., Salina, Kansas.

6. One (1) 1979 Cadillac.

7. One (1) 1976 Cadillac.

VII. Each party should assume and pay all indebtedness contracted or incurred by him on or after June 10, 1982, and neither party should have judgment against the other with respect to any such indebtedness.

VIII. The costs hereof should be assessed to the Plaintiff.

IT IS THEREFORE, BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED as follows:

IX. That the Plaintiff, Roy Arthur Clemence, be and he is hereby granted a Decree of Divorce from the Defendant, Bonnie J. Clemence, on the grounds of incompatibility and the marital bonds heretofore established between the Plaintiff and the Defendant are hereby permanently and absolutely dissolved.

X. That the property of the parties is hereby divided between them in the manner following:

A. The Plaintiff shall have as his sole and separate property, free and clear of all claims of the Defendant, the following:

1. All that real estate listed and enumerated on Exhibit A annexed hereto, subject, however, to the

final determination yet to be made by the United States Bankruptcy Court for the District of Kansas concerning the validity of a certain deed executed on the 19th day of May, 1982, by the parties as Trustees of the Bonnie J. Clemence Trust purporting to convey to Karen K. Clemence and Lontie J. Clemence certain tracts of land situated in Dickinson County and Ottawa County, Kansas, which are listed among those shown on the aforesaid Exhibit A. Should the aforesaid deed be finally determined to be invalid it is the finding of this Court that the ownership of all lands described therein as well as the other lands described in the aforesaid Exhibit A should be set over to the Plaintiff as his sole and separate property, free and clear of all claims of the Defendant. Should said deed be finally determined to

be valid then this finding shall have no bearing on the lands described therein.

2. All interest of the parties in and to a certain contract for the sale of real estate entered into by and between Plaintiff and Defendant as Sellers and Samuel W. Kincaid and Georgia L. Kincaid as Buyers, said contract being dated the 4th day of April, 1979, and escrowed at the Assaria State Bank, Assaria, Kansas.

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4. All interest of the parties in and to a certain contract for the purchase of real estate entered into by and between the Plaintiff and Defendant as Buyers and Otis Rollins Clemence and Beulah Clemence as Sellers, said contract being dated the 11th day of January, 1974, and escrowed at the Citizens Bank and Trust Co., Abilene, Kansas.

5. All interest of the parties in and to a certain contract for the purchase of real estate entered into by and between the Plaintiff and Defendant as Buyers and Beulah Luella Clemence as Seller, said contract being dated the 17th day of August, 1977, and escrowed at the Citizens Bank and Trust Co., Abilene, Kansas.

6. All interest of the parties in and to a certain contract for

the purchase of real estate entered into by and between the Plaintiff and Defendant as Buyers and Beulah Luella Clemence as Seller, said contract being dated the 17th day of August, 1977, and the Addendum to said contract being dated the 20th day of July, 1978, and escrowed at the Citizens Bank and Trust Co., Abilene, Kansas.

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b) One (1) Farmhand tub grinder;

c) One (1) 8' Speed mover;

d) One (1) John Deere 158 loader;

e) Two (2) pickup beds;

f) Two (2) truck feed boxes.

10. All motor vehicles belonging to either or both of the parties, except two (2) Cadillac sedans, including but not limited to the following:

a) One (1) 1980 Chevrolet 1/2

Ton Four Wheel drive pickup;

b) One (1) 1975 GMC 1/2 ton pickup truck;

c) One (1) 1969 Chevrolet two ton truck (wrecked);

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e) One (1) 1965 Ford two ton truck;

f) One (1) 1957 Chevrolet two ton truck (registered);

g) One (1) 1957 Chevrolet two ton truck (unregistered);

h) One (1) 1974 Chevrolet half ton four-wheel drive;

i) One (1) 1973 Chevrolet 3/4 ton truck (shop truck);

j) One (1) 1974 Chevrolet 1/2 ton pickup truck (inoperable);

k) One (1) 1965 Chevrolet truck (tractor truck);

l) One (1) 1965 El Camino;

m) One (1) 1965 El Camino;

n) One (1) 1950 Chevrolet one ton truck.

11. Life insurance policies issued on the life of the Plaintiff, as follows:

a) Victory Life Insurance policy no. 586603;

b) Manhattan Life Insurance policy no. 756034;

c) New York Life Insurance policy no. 36,001,732;

d) New York Life Insurance policy no. 27,043,163;

e) New York Life Insurance policy no. 27,018,894;

f) New York Life

Insurance policy
no. 27,018,895.

12. All grain, hay and silage now in storage belonging to either or both of the parties, including but not limited to the following:

a) 799.92 bushels of 1977 wheat in the Abilene, Coop. Assoc., Abilene, Kansas;

b) 679.00 bushels of 1979 wheat in the Abilene Coop. Assoc., Abilene, Kansas;

c) 156 bushels of wheat in the Lincoln Coop, Lincoln, Kansas.

13. All shares of stock now owned by the parties or either of them in the following farm cooperatives:

a) The Farmers Coop. Assoc., Talmage, Kansas;

b) The Solomon Coop. Assoc., Solomon, Kansas;

c) The Abilene Coop. Assoc., Abilene, Kansas.

14. All reserved patronage dividends now held for the account of the parties or either of them by the following farm cooperatives:

a) The Farmers Coop. Assoc., Talmage, Kansas;

b) The Solomon Coop. Assoc., Solomon, Kansas;

c) The Abilene Coop. Assoc., Abilene, Kansas.

15. All shares of stock now issued by the Federal Land Bank of Wichita, Kansas, to the parties or either of them.

16. Two (2) quarter horses.

17. All those proceeds now held by the Clerk of this Court deriving from the sale or sales of cattle pursuant

to previous orders made herein, said proceeds together with interest accruing thereon to be paid to the Plaintiff forthwith.

18. That certain promissory note in the principal sum of $28,000.00 issued by Lontie J. Clemence to the parties on or about the 16th day of October, 1979, and the first real estate mortgage securing the same, said mortgage being dated the 16th day of October 1979, and recorded on December 28, 1979, in Mortgage Book 168, Page 517 in the office of the Dickinson County Register of Deeds.

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20. All interest of the parties or either of them in those proceeds from the 1983 wheat crop

impounded and now held by the Clerk of the United States Bankruptcy Court together with all interest accruing thereon.

21. All of the interest of the parties or either of them in government payments under the 1983 farm programs including all grain entitlements under 1983 PIK contracts pertaining to any of the lands described above.

22. All of the interest of the parties or either of them in 1984 crops now growing or heretofore harvested from any of the lands described above.

23. All of the interest of the parties or either of them in pasture rentals accrued or accruing under 1983 and current leases of any of the real estate listed above.

24. All claims against Lontie J. Clemence and Karen K. Clemence

for reimbursement for crops harvested in 1983 and 1984 and government program payments made in connection therewith and for pasture rentals for 1983 and 1984, all with respect to any of the real estate described in Exhibit A annexed hereto.

25. All counterclaims and crossclaims filed by the parties or either of them in this Court in Case No. 80 C 205, Ralph M. Stoneberger and Debra Stoneberger vs. Roy A. Clemence and Bonnie J. Clemence, et al.

26. All capital credits held for the account of either or both of the parties by D.S.&O. Rural Electric, Solomon, Kansas.

27. Plaintiff's checking account in the Citizens Bank and Trust Co, Abilene, Kansas.

B. The Defendant shall have as her sole and separate property, free and clear of all claims of the Plaintiff, the following:

1. All household goods and antiques belonging to the parties or either of them, but not including the ornamental iron above awarded to the Plaintiff.

2. All cash presently in her possession.

3. Cemetery lots in Salina, Kansas.

4. Two (2) Arabian horses.

5. The real estate situated in Saline County, Kansas, described as follows:

a) Lot Three (3), Elm Grove Addition, Salina, Kansas;

b) The South Six Feet (6') of Lot Five (5), Block Seventeen (17), South Park Addition, Salina, Kansas;

c) A triangular tract adjacent to and North of Lots Three (3), Four (4) and Five (5), Block Eleven (11), Chicago Addition plus the adjacent vacated Grand Blvd., Salina, Kansas.

6. One (1) 1979 Cadillac.

7. One (1) 1976 Cadillac.

XI. Each party shall assume and pay all indebtedness contracted or incurred by him or her on or after June 10, 1982, and neither party shall have judgment against the other with respect to any such indebtedness.

XII. The costs hereof are assessed to the Plaintiff.

XIII. That the parties shall execute, deliver and exchange wherever the same

may be necessary to effectuate the judgments issued herein deeds, receipts, bills of sale, and any and all other necessary and incidental documents. In the event of the failure or refusal of either of the parties to so execute and deliver such instruments as may be necessary to effectuate the judgements issued herein, then and in that event the judgments made herein shall stand in lieu of such instruments.

S/_____
District Judge, Div. I

SUBMITTED BY:

LEHMAN, GUILFOYLE & HINKLE

By S/Max M. Hinkle
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

In re:	)
	)
KAREN KAY CLEMENCE No. 83-40307	)
LONTIE JOE CLEMENCE No. 83-40308	)
	)
Debtors,	)
	)
CITIZENS BANK AND TRUST COMPANY OF ABILENE,	)
	)
Plaintiff,	)
vs. Adversary Proceeding	)
	)
KAREN KAY CLEMENCE and No.83-0232	)
LONTIE JOE CLEMENCE, No.83-0233	)
	)
Defendants.	)
	)
ROY ARTHUR CLEMENCE,	)
	)
Plaintiff,	)
	)
vs. Adversary Proceeding	)
	)
KAREN KAY CLEMENCE and No.83-0291	)
LONTIE JOE CLEMENCE, No.83-0292	)
	)
Defendants.	)

O R D E R

This case is before the court for a review of findings made by Bankruptcy

Judge Pusateri in a memorandum of decision lodged February 24, 1984 pursuant to Rule 42 of the Local Rules of Practice. This Rule provides:

> In conducting review, the district judge may hold a hearing and may receive such evidence as appropriate and may accept, reject or modify, in whole or in part, the order or judgement of the bankruptcy judge, and need give no deference to the findings of the bankruptcy judge. At the conclusion of the review, the district judge shall enter an appropriate order or judgment.

This court has carefully reviewed the lengthy transcript of the hearing which was the basis of Judge Pusateri's decision. In addition, the court has reviewed memoranda submitted by the interested parties and "additional evidence" submitted by the debtors. On the basis of this study, the court makes the following findings:

1. This court has jurisdiction over this matter under 28 U.S.C. Section 1334 and 1471 (a) (b) & (e).

2. This matter was properly referred for decision by Bankruptcy Judge Pusateri under Local Rule 42.

3. Local Rule 42 is not unconstitutional and empowers this court to grant authority to Bankruptcy Judge Pusateri to hear this case. Oklahoma Health Services Federal Credit Union v. Webb, 726 F.2d 624 (10th Cir. 1984); White Motor Corp. v. Citibank, 704 F.2d 254 (6th Cir. 1983).

4. Roy Clemence is a proper party with an interest in the property claimed by the debtors by reason of his petition for separate maintenance. Cady v. Cady, 224 Kan. 339, 581 P.2d 358 (1978).

5. No error was committed by proceeding in the absence of Bonnie

Clemence as a party for the following reasons:

a) The findings of this court do not injure any interest asserted by Bonnie Clemence;

b) Bonnie Clemence had an opportunity to assert an interest as an intervening party but did not elect to do so;

c) Any interest of Bonnie Clemence in sustaining her conveyance to the debtors was fully represented by the debtors in this action;

d) The parties in this suit are not subject to double, multiple, or inconsistent obligations by reason of any interest claimed by Bonnie Clemence; and

e) There is no other reason in equity or good conscience for the joinder of Bonnie Clemence as a party.

6. Aside from the factual findings that Lynn Hoover did not know of the May 19, 1982 deed prior to December 1982, the court shall adopt the findings of fact and conclusions of law contained in the memorandum of decision lodged by Judge Pusateri. The court finds that Hoover knew of the deed prior to December 1982. This finding, however, does not alter the court's decision to accept the other findings and conclusions submitted by Judge Pusateri.

7. The court has considered the "new evidence" submitted on behalf of the debtors, most, if not all, of which could have been presented during the hearing before Judge Pusateri. This evidence has not persuaded the court to decline to accept the findings of Judge Pusateri, to hold further hearings on this matter, or to completely retry the issues involved.

8. Debtors have had sufficient time to present evidence and arguments in this matter. The court is convinced that an extension of time would serve no useful purpose. Consequently, debtors' motion for enlargement of time filed April 27, 1984 is denied.

In conclusion, the court has reviewed the memorandum of decision of Judge Pusateri lodged on February 24, 1984 in accordance with Local Rule 42(e)(2)(B) and approves and adopts the findings of fact and conclusions of law contained therein consistent with the previous statements in this order.

IT IS SO ORDERED.

Dated this 16th day of July, 1984, at Topeka, Kansas.

S/Richard D. Rogers
United States District Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re:	)
	)
KAREN KAY CLEMENCE	No. 83-40307)
LONTIE JOE CLEMENCE	No. 83-40308)
	)
Debtors.	)
- -	)
	)
CITIZENS BANK AND TRUST COMPANY OF ABILENE,	)
	)
Plaintiff,	)
	)
vs. Adversary Proceeding	)
	)
KAREN KAY CLEMENCE and	No. 83-0232)
LONTIE JOE CLEMENCE,	No. 83-0233)
	)
Defendants.	)
- -	)
	)
ROY ARTHUR CLEMENCE,	)
	)
Plaintiff,	)
	)
vs. Adversary Proceeding	)
	)
KAREN KAY CLEMENCE and	No. 83-0291)
LONTIE JOE CLEMENCE,	No. 83-0292)
	)
Defendants.	)
_____	)

MEMORANDUM OF DECISION

In this chapter 11 proceeding, the Court must determine whether the debtors own some 5,000 acres of real estate purportedly acquired by gift from their mother and father, and now challenged by their father and creditors.

The debtors are represented by Randall W. Forbes of Crane, Martin, Claussen, Hamilton & Forbes, Topeka, Kansas, and Peter V. Smilde of Smilde & Elkins, Dallas, Texas.

The creditor Citizens Bank and Trust Co. of Abilene is represented by Dale L. Somers of Eidson, Lewis, Porter & Haynes, Topeka, Kansas. Roy Clemence, father of the debtors, is represented by Charles R. Hay of Goodell, Stratton, Edmonds, Palmer & Wright, Topeka, Kansas, and Max M. Hinkle of Lehman, Guilfoyle, & Hinkle, Abilene, Kansas. The creditor National Bank of America at Salina is represented

by James T. Graves of Clark, Mize & Linville, Salina, Kansas.

Bonnie Jean Clemence, the debtors' mother and alleged transferor/donor, was not a party to this action and though she appeared as a witness, she was not represented.

The Court must decide the following issue:

Was the transfer of May 19, 1982 from the Bonnie Clemence Trust to Lontie and Karen Clemence of virtually all the Clemence real estate a valid transfer.

Do the debtors, Lontie and Karen Clemence, own the real estate in question.

FINDINGS OF FACT

Tolstoi wrote: "Happy families are all alike; every unhappy family is unhappy in its own way." (Anna Karenina, Pt. 1, ch. 1). Multiple chapter 11

proceedings, criminal accusations, a divorce proceeding and a bitter struggle over substantial land holdings and prospective inheritance is the unhappy way of this unhappy family.

Throughout this opinion, the Court refers to the members of the Clemence family by their first names. This is done neither out of disrespect nor familiarity. The members of the family were addressed and referred to by their first names at trial, and for purposes of continuity and clarity, the practice is continued in this opinion.

Roy C. Clemence is 76 years old. He has an eighth grade education. He first married when he was 28 years old to Zella Smith and 2 sons were born to the marriage: Roy Douglas Clemence (Doug) and Charles Roy Clemence (Chuck).

In 1953, Zella died. Roy had been acquainted with the Wilson family for several years. In 1954, Roy, at the age of 47, married one of the Wilson children, Bonnie Jean, who was then 26. When Roy married Bonnie, he owned one section of grassland in Dickinson County, Kansas, 5 pieces of river bottom ground and an interest in 880 acres in Geary County. The Wilson family apparently owned significant amounts of property. Though Bonnie did not immediately bring much of this property to the marriage, sometime later she received through inheritance her proportionate share of the family property.

Roy and Bonnie were married in May, 1954, and they entered into a written agreement in September, 1954 (defendant's exh. C). In the agreement, it is recited that Bonnie consented to Roy's will in

which she would receive less than one-half of his property. Roy agreed to waive his interest in any inheritance to be received by Bonnie and in certain property owned by Bonnie at the time. Roy and Bonnie had two children: Karen Kay Clemence and Lontie Joe Clemence. After their births, the substance of the 1954 agreement was repeated in subsequent wills. In 1968, both Roy and Bonnie executed wills and consented to each other's will. Bonnie's will (defendant's exh. F) provided that her property would pass to Roy for his life, with the remainder to Lontie and Karen. Roy's provided for a bequest of $40,000 to Doug, subject to an advancement and ademption made in 1965, and subject to payment of obligations guaranteed by Roy. Roy's will also provided for a bequest of land to Chuck, subject to similar

limitations. The remainder of Roy's property was to go to Bonnie and Karen and Lontie.

In 1978, trust agreements and new wills were executed by Bonnie and Roy (defendant's exhs, K, L, M and N. These agreements also provided for relatively small transfers to Doug and Chuck, and the bulk of the estate passing to Lontie and Karen.

There were allegations at the trial that Bonnie had defrauded Roy since 1954. There were allegations at the trial that since 1954 Roy never intended to essentially cut Doug and Chuck out of any property acquired by Bonnie. The documents, however, indicate quite plainly that Roy and his children would have no claim to Bonnie's estate existing in 1954, and any inheritance from the Wilson family. The documents also

indicate that both Roy and Bonnie intended the bulk of their estate to pass to only Lontie and Karen and not Doug and Chuck. Perhaps (in 1954) prior to the substantial growth in the couple's assets this seemed fair to Roy. Certainly by 1982 Roy did not believe it was fair for Karen and Lontie to receive the bulk of the Clemence farm. By 1982, Roy desired that one-half of all the land holdings go to Lontie and Karen, and one-half to Chuck and Doug. Bonnie rejected this proposal, desiring all the land to go to Lontie and Karen and, according to Roy, said "Wilson all the way."

After 1954, Bonnie and Roy operated their farm and in addition to giving birth to Lontie and Karen, they managed to dramatically increase their assets until, by 1982, the farm they operated was approximately 5,000 acres in size

located in 4 counties in Kansas. This land, however, was not land that would pass to Chuck and Doug, but rather, according to the wills and trusts, was destined to eventually pass to Karen and Lontie.

A number of events occurred in 1982 that brought to a head the family conflicts.

In May, 1982 and after contacting Bonnie and Roy a number of times concerning collection of or obtaining security for a debt, the Citizens Bank & Trust Co. of Abilene (Citizens) filed suit against Bonnie and Roy to collect the obligation owed to Citizens. There was quite a bit of testimony concerning the history of the Clemence line of credit with Citizens, use of the funds by either Roy, Bonnie, Roy and Bonnie, or Chuck and Lontie in the course of a

partnership called Clemence Brothers established to run the farm. In 1982 Citizens was interested in securing a mortgage on the 5,000 acre farm to secure the debt. Bonnie felt the Citizens obligation was Roy's and that her property destined to pass to Lontie and Karen should not be used to pay Roy's or the debts of the children of Roy's first marriage. The Court does not view it essential to attempt to resolve the many conflicting facts surrounding the Citizens loan. Suffice it to say the debt was due, Citizens could not obtain satisfaction, payment or security from any of the Clemence family, and it determined it necessary to take legal action.

In May, 1982 Citizens contacted Max Hinkle, an attorney in Abilene, to file suit against Bonnie and Roy. Before May,

1982 Mr. Hinkle had represented Roy and Bonnie. His work for them included preparation of real estate sale contracts and consent forms in conjunction with water rights applications. Other interested parties in this proceeding represented from time to time by Mr. Hinkle in matters directly relating to the Clemences included the Federal Land Bank for whom he did a title search in connection with the Clemence's attempt to secure a loan from the Land Bank. Mr. Hinkle also filed a criminal complaint as special prosecutor in Dickinson County at the behest of Chuck Clemence against Bonnie and Karen. (See, e.g., defendant's exh. GGG)

On May 18, 1982 Mr. Hinkle filed an action against Roy and Bonnie on behalf of Citizens. In the first count, Citizens sought judgement against only

Roy in the amount of approximately $149,000. In the second count, Citizens sought judgement against both Roy and Bonnie based on insufficient funds checks. Roy was served personally on May 27, 1982 and Bonnie was served on the same day. Sometime between May 27, 1982 and June 10, 1982 Roy approached Mr. Hinkle to represent him. Mr. Hinkle made a full disclosure to and obtained the consent of Citizens (although the Court cannot fathom why Citizens would object). Mr. Hinkle made a full disclosure to and obtained the consent of Roy. Thus, in count 1 of the complaint against Roy, Mr.. Hinkle represented both the plaintiff and the defendant. Apparently, even though one of Mr. Hinkle's allegations in the instant bankruptcy court action on behalf of Roy Clemence (Mr. Hinkle represented Roy Clemence in

this action) is that Roy had "diminished capacity" or at least was extremely maleable in the hands of people he trusted in May-June, 1982 due to his age, and Parkinson's disease, apparently Mr. Hinkle had no problem believing that Roy, although diminished in capacity, nonetheless maintained sufficient capacity to understand and competently determine that he wanted to be represented by the same attorney representing Citizens. The Court must candidly admit it has never understood Mr. Hinkle's theory of sliding-scale capacity and undue influence by persons in whom Roy placed trust. In any event, on June 10, 1982 Mr. Hinkle filed an answer for Roy in which Roy consented to judgement in favor of Citizens in the amount of $149,974.31, plus interest and costs. A journal entry was filed that

same day reflecting the consent judgement. Also on June 10, a cross petition was filed by Mr. Hinkle for Roy against Bonnie alleging she was liable for 1/2 of all judgements awarded to Citizens.

Several events occurred in May just prior to the commencement of Citizens' May 18, action.

On May 10, 1982 a warranty deed was executed transferring the land eventually destined to be Chuck's (see defendant's exhs. G, L) from the Roy Clemence Trust to the Bonnie Clemence Trust. The document was executed by Roy and Bonnie as trustee's of the Roy Clemence Trust, and notarized by Loren Harris of the National Bank of America (NBA) in Salina, Kansas (defendant's exh. 0). This transfer (plaintiff's exh. 1) was apparently made to comply with a May,

1982 request of the Federal Land Bank (defendant's exh. FF). The basis of the request was a requirement made after a title search by Mr. Hinkle for the FLB in relation to a pending loan application by Roy and Bonnie Clemence.

On May 19, 1982 an undivided 1/2 interest in certain Ottawa County property held in the Roy Clemence Trust was transferred to the Bonnie Clemence Trust. Again, the deed was executed by Roy and Bonnie in their trustee capacity (defendant's exh. R). On May 19, 1982 virtually all the Clemence real estate, now being held in the Bonnie Clemence Trust, was deeded in a General Warranty Deed to Lontie and Karen Clemence (defendant's exh. S). The descriptions of the land transfer are attached to exhibit S and are over 5 legal pages in length. This transfer was also executed

by Bonnie and Roy in their capacity as trustees.

The sum and substance of these transfers were that in a matter of 9 days, virtually all of the Clemence property, 5,000 acres in four counties, held in either Roy's or Bonnie's trust was transferred, at least on paper, to Karen and Lontie Clemence for consideration of $1.00.

To further summarize, throughout April and May Citizens had been attempting to obtain security for their debt, preferably a mortgage on the Clemence land. Roy favored it. Bonnie opposed it. Citizens filed an action to collect the debt on May 18. Bonnie knew of the action on May 19 if Mr. Hinkle's testimony is believed. (In addition to the many parties represented by Mr. Hinkle, he was also called as a witness

by Karen and Lontie and provided what the Court views as key evidence. It is also interesting to note that in Bonnie's prior chapter 11 proceeding in this Court, Mr. Hinkle took the stand, as called by Dale Somers, an attorney for Citizens, to provide the only testimony offered in Citizens' motion to dismiss Bonnie's chapter 11.) Bonnie did not know of the action on May 19 if her testimony is believed, and the land was transferred to Karen and Lontie on May 19 for the consideration of $1.00.

The Court finds that on May 19 Bonnie either knew the suit was about to be filed due to Citizens' activities in April and May, or actually knew the suit had been filed, before service was obtained.

There was considerable evidence presented concerning the validity and

propriety of the transfers between the Roy Clemence Trust and the Bonnie Clemence Trust. Roy denied understanding the trust of 1978, the advances and ademptions with Chuck and Doug, the wills of the 1960's and even the agreement of 1954. Roy presented testimony to show that he executed the May, 1982 documents as a result of diminished capacity and undue influence, as part of a fraudulent scheme by Bonnie, Karen and Lontie to remove him from the farm operation, and to see to it that Karen and Lontie, and not Chuck and Doug, received the land. Needless to say there is conflicting evidence on these points.

On June 10, 1982 (the same day Roy consented to judgement in favor of Citizens and cross petitioned against his wife for 1/2 of the amount of the judgement), Max Hinkle filed a separate

maintenance action for Roy Clemence against Bonnie Clemence. This action was later amended to seek a divorce from Bonnie. Also on June 10, 1982 a restraining order was entered prohibiting Bonnie and Roy from transferring any property.

On July 29, 1982 Bonnie Clemence filed a chapter 11 petition in bankruptcy in this court. In her petition schedules, Bonnie listed the real estate located in Lincoln and Saline Counties as property owned by her. She listed the Dickinson and Ottawa Counties property as "Bonnie Clemence, Farm Land, Improvements . . . ." (see plaintiff's (Roy) exhs. 33, 43). She claimed 160 acres as exempt. In her schedules she stated that the only property she held for another person (question 8 in statement of financial affairs) was "Contingent. Bonnie Wilson

Clemence Trust, October 20, 1978 as amended 5/19/82." The amendment to which she referred is reflected in plaintiff's (Roy) exhibit 6 and constituted the creation of what is known as a QTIP trust. The QTIP trust did not purport to affect a transfer of ownership of the real estate in question to Karen and Lontie on May 19, 1982 and the attorney who drafted the QTIP trust (Lynn C. Hoover) testified he was unaware of the May 19 land transfer to Karen and Lontie. Although not outside the total family estate plan as he understood it, Mr. Hoover stated the transfer was not made on his advice. In answer to question 14 of the statement of financial affairs, Bonnie stated she had not made any gifts to family members in the year preceding her bankruptcy petition, nor had she made

any transfers other than granting a mortgage to the National Bank of America.

In the course of their parents' domestic relations action, Karen and Lontie were represented by Martin W. Bauer, an attorney from Wichita. In the instant action, the parties stipulated Mr. Bauer would testify he had no knowledge of the May 19 deed until after December 14, 1982 (plaintiff Roy's exh. 65).

On May 26, 1982 Bonnie granted Lontie the power of attorney to execute all Agricultural Stabilization County Supervisor (ASCS) forms (Roy's exh. 23). Roy's exhibit 27 indicates that in February, 1983 Bonnie contracted with Marvin and Marcia Freeman to sell them land on the authority of this Court in Bonnie's chapter 11 proceeding. Roy's exhibit 28 indicates a similar sale by

Bonnie to Stewart International, Inc. in February, 1983. See also Roy's exhibit 53. Both tracts of real estate to be sold by Bonnie in 1983 were part of the May 19 deed purportedly transferring the land to Karen and Lontie (compare Roy's exh. 4). Exhibits 27 and 28 do not mention Karen, Lontie or their claimed interest in the land.

In the domestic relations case Roy propounded interrogatories to Bonnie which she answered in October, 1982. (Roy's exh. 39) Interrogatory 10 asked if Bonnie "sold or disposed" of real property within the last 12 months. She answered "Apart from some estate planning transfers," there were none. The interrogatory #10 also requested Bonnie to "specify in detail any item of property sold or disposed of by gift, sale or otherwise, [and] the person to

whom said property was transferred . . . ." Bonnie's answer did not respond.

On Bonnie's monthly financial reports in her chapter 11 proceeding, she claimed the value of the real estate, almost $2.5 million, as her asset. (See, e.g., Roy's exhs. 47, 48, 49, 51, 52).

Not a single witness was produced at the instant trial who could testify that they knew or were informed of the May 19 deed until sometime in December, 1982. Neither John Koepke nor Donald Louden, Bonnie's bankruptcy attorneys, knew of the deed. Both testified they first heard of the deed in December, 1982. This testimony directly conflicts with the testimony of Bonnie and Karen who stated both attorneys were aware of the deed and were informed of the deed in June or July, 1982. Lynn C. Hoover, Bonnie's estate planning attorney, had no

knowledge of the deed. Representatives of the creditors involved in this case testified they did not know of the deed, although Loren Harris of NBA notarized the deed but asserted he did not read the document nor did he question what was being transferred. Federal Land Bank was unaware of the deed. Martin Bauer, Karen and Lontie's attorney in their parents' domestic relations action, had no knowledge of the deed prior to December of 1982.

Bonnie testified that Frank Norton, a Salina attorney who prepared a number of deeds for the Clemences, prepared the May 19 deed, but Mr. Norton testified neither he nor his office prepared the May 19 deed.

The deed was not filed of record by Karen and Lontie until April 25, 1983. This is curious because the May 10 deeds

transferring realty from Roy's trust to Bonnie's trust were filed of record on May 19, 1982. The May 14, 1982 deed was also filed of record on May 19. Thus, the only May, 1982 deed that was not filed immediately was the May 19 deed. It is clear to the Court that the May 19 deed was not recorded because Bonnie, Karen and Lontie believed the transfer was not effective until the deed was recorded. No gift tax return was filed dealing with the May 19 5,000 acre gift to Karen and Lontie.

Upon questioning by the Court, Karen indicated the following people were told of the deed:

> Orvil Teaman of Farmer's Home Administration, Dave Smith of Salina Credit Association, John Koepke, Bonnie's bankruptcy attorney Don Louden, Bonnie's Bankruptcy attorney.

Upon questioning by the Court, Karen indicated the following people knew of the deed:

Loren Harris of NBA
Martin Bauer, her attorney
in the domestic relations
action,
Bob Jones, an attorney
practicing with Frank
Norton

Yet, when called upon, no one testified they knew of, were told of, or even suspected the existence of the deed of May 19, until December, 1982. In December, 1982 the existence of the deed was discovered, and this Court ordered the dismissal of Bonnie's chapter 11 case on March 28, 1983.

On April 18, 1983 Karen and Lontie filed separate pro se chapter 11 petitions, claiming ownership of the land in question. They later employed counsel.

In addition to these facts the Court specifically finds as follows:

1. Before December, 1982, Karen, Lontie and Bonnie Clemence never

communicated to anyone other than Roy Clemence that virtually all 5,000 acres of real estate had been transferred to Karen and Lontie. The Court does not address the issues surrounding Roy's knowledge, participation or mistake in the transfer nor the issue of undue influence by Bonnie over Roy. The Court simply finds, contrary to the assertions of Karen, Lontie and Bonnie, that the transfer was never communicated to the many people they assert were told.

2. Karen, Lontie and Bonnie did not believe the transfer was effective until such time as the deed was filed of record.

3. The transfer was intended by Bonnie to be completed sometime in the future for the primary purpose of insuring that descent of the realty to Karen and Lontie as outlined in the many

agreements, wills and trusts executed by Roy and Bonnie since 1954 was carried out, and for the secondary reason of protecting the property from satisfaction of debts she considered solely Roy's, e.g., Citizens.

4. The actual ownership of the land as between Roy and Bonnie is irrelevant to this Court's determination because of the pending domestic relations action and because Bonnie Clemence is not a party to this proceeding.

5. Without deciding, but assuming arguendo that Roy willingly, competently, with full knowledge, and without influence executed the deeds of May 10, 14 and 19, 1982, nevertheless, he, like Bonnie, did not intend the deed to Karen and Lontie to be effective until some time in the future.

6. As of June 10, 1982, neither Bonnie, Roy, Karen or Lontie intended that Karen and Lontie own the land on that date.

7. As of February, 1983 neither Bonnie, Roy, Karen or Lontie intended that Karen and Lontie own the land on that date.

8. The Court makes no findings with respect to undue influence exercised by Bonnie over Roy, fraud perpetrated by Bonnie on Roy during May, 1982, 1978, 1976, 1968 or since 1954. The Court makes no findings with respect to any participation of Karen and Lontie in any fraud or undue influence.

9. Throughout Bonnie's chapter 11 proceeding, Karen and Lontie attended hearings, were approved as employee's of Bonnie's farming operation, and never uttered a word concerning their purported

ownership of the farm until December, 1982.

CONCLUSIONS OF LAW

When a transfer is made without consideration, such as the recited consideration of $1 in a real estate deed, there is an inference that a gift was intended. Hansen v. Walker, 175 Kan. 121, 123, 259 P. 2d 242 (1953). The elements of a valid gift are:

1. Intent by donor to make a voluntary, gratuitous, absolute transfer of property from the donor to the donee, effective immediately upon transfer and in which there is complete immediate surrender of control by the donor;

2. Delivery by the donor, and

3. Acceptance by the donee.

See, e.g., Truax v. Southwestern College, Oklahoma, 214 Kan. 873, 522 P.2d 412 (1974); In Re Brown's Estate, 159 Kan. 408, 155 P.2d 445 (1945); Lanphear v. McLean, 135 Kan. 266, 10 P.2d 889 (1932);

Hall v. Hall, 76 Kan. 806, 93 P. 177 (1903); Bruce v. Squires, 68 Kan. 199, 74 P. 1102 (1904); Gallagher V. Doraky, 65 Kan. 341, 69 P 330 (1902). The party asserting a valid gift has the burden of proving the existence of all the elements of a gift. Traux v. Southwestern College, Oklahoma, 214 Kan., supra 878.

The donor's intent is determined by the acts, words and circumstances surrounding the transfer. Stevenson v. Hunter, 131 Kan. supra at 754. The Court holds there was no intent by Bonnie or Roy to make an absolute transfer of the real estate to Lontie and Karen, nor to effect a complete and immediate surrender of control of the property. Certainly from Roy's standpoint, there are questions concerning fraud and undue influence which, if proved, would vitiate any intent he may have had to make an

absolute transfer. See, e.g., Frame v. Bauman, 202 Kan. 461, 449 P.2d 525 (1969); Seward v. Seward, 59 Kan. 387, 53 P. 63 (1898). More importantly for this Court's decision, however is an examination of Bonnie's intent.

Based on Bonnie's belief that the deed was not effective until recorded; her treatment of the land as hers and only hers from and after May 19, 1982; the secretive nature of the transfer in which one was told of the transfer for 7 months; her statements in writing, in her bankruptcy proceeding and the domestic relations action, may under oath, that she alone owned the real estate, it's clear to the Court that Bonnie did not intend the transfer to be effective on May 19, 1982.

In addition, she never surrendered control. See, Lamphear v. McLean, 135 Kan. 266, 10 P.3d 889 (1932); Bruce v. Squires, 68 Kan. 199, 74P. 1102 (1904); 38 CJS Gifts Section 20 at 799 (1943). The transfer must be so complete:

> that if the donor again resumes control over the property, without the consent of the donee, [s]he will become liable as a trespasser.

38 Am. Jur.2d Gifts Section 18 (1968). At all times, up to 1983, Bonnie controlled the land, claimed to own the land, attempted to sell the land without the donees' written consent in the sale contract, and in fact intended to use the land to generate money to fund her chapter 11 plan. Furthermore, a delivery for safekeeping or for a purpose, express or implied, other than a specific intent to part with all right, title and interest in and all dominion over the property does not constitute a gift.

Boling v. Gibson, 226 Ark. 310, 584 SW2d 14, 17 (1979), affirmed after remand, 622 SW2d 180. This "delivery" to Karen and Lontie was made without the specific intent to part with all right, title and interest in, and dominion over the real estate. This transfer was made to put the property beyond the reach of Citizens because of the belief that the Citizens debt was a debt of Roy, Chuck and Doug, and should not be satisfied out of real estate destined to pass to Lontie and Karen only and to ensure that 28 years of intent as expressed by various wills and trusts be carried out.

Either Karen or Lontie or both appeared with their mother at hearings during her chapter 11 proceeding. Lontie and Karen were paid and listed as employees in their mother's chapter 11 proceeding (exh. 42, 5). From July 23,

1982, the date of filing of Bonnie's chapter 11, to at least mid-December of 1982 neither Karen nor Lontie disclosed their purported ownership of the 5,000 acres of land listed as an asset in their mother's chapter 11 proceeding. Additionally, they did not object to her offering for sale during that chapter 11 proceeding various tracts of that 5,000 acres nor did they voice an objection to proposed sales which, though not consummated, had times set for objection and called for hearing.

> No gift can be complete without the acceptance thereof by the donee . . . . The law presumes such acceptance in the absence of evidence to the contrary.

Mahoney v. Martin, 72 Kan. 406, 410, 83 P. 982 (1905) (emphasis added). In the instant case, Karen and Lontie's silence, their acquiescence in Bonnie's claim of ownership in the land, their employment

by Bonnie (certainly this is a fact inconsistent with ownership - if Karen and Lontie owned the land, they should have employed Bonnie) and allowing Bonnie to sell the land all indicate that there was not an acceptance of the gift until at least February, 1983.

Therefore, the Court holds the transfer of the real estate to Karen and Lontie on May 19, 1982 was not an effective gift, because it lacked, and Karen and Lontie failed to prove, the requisite elements of a gift. Even if the burden of proof in this case was on Roy and the creditors, as Karen and Lontie argue, the Court would hold that Roy and the creditors have proved that a valid gift was not made. The Court holds there was no intent to make a transfer, nor was there an effective transfer before June 10, 1982. At that point,

Bonnie as enjoined from transferring the property in any manner by the restraining order issued by the state court judge in the domestic relations actions. Accordingly, the Court holds that the owner of the real estate is the Bonnie Clemence Trust and not the debtors in this chapter 11 proceeding, Karen and Lontie Clemence. The Court makes no determination of the allegations of diminished capacity of Roy, fraud perpetrated on Roy, nor undue influence exercised to Roy's detriment. By this Court's holding today, the property is returned to the jurisdiction of the state court to be divided in the divorce proceeding pursuant to the state court's authority, in light of the agreements, wills and trusts since 1954, the statutory and case law factors, and in light of the allegations made by Roy.

The foregoing constitutes Findings of Fact and Conclusions of Law under Bankruptcy Rule 7052 and Rule 52(a) of the Federal Rules of Civil Procedure.

Dated at Topeka, Kansas this 24 day of February, 1984.

S/James A. Pusateri

CERTIFICATE OF MAILING

The undersigned certifies that a copy of the foregoing Memorandum of Decision was placed in the United States mail on the 24th day of February, 1984 addressed to:

Randall J. Forbes
CRANE, MARTIN, CLAUSSEN, HAMILTON & FORBES
3401 Harrison Street
Topeka, Kansas 66611

Peter V. Smilde
SMILDE & ELKINS
5307 E. Mockingbird Lane
Suite 900
Dallas, Texas 75206

Dale L. Somers
EIDSON, LEWIS, PORTER & HAYNES
1300 Merchants National Bank Bldg.
Topeka, Kansas 66612

Charles R. Hay
GOODELL, STRATTON, EDMONDS, PALMER & WRIGHT
215 East Eighth Street
Topeka, Kansas 66603

Max M. Hinkle
LEHMAN, GUILFOYLE & HINKLE

306 NW 2nd Street
Abilene, Kansas 67410

James T. Graves
CLARK, MIZE & LINVILLE
Post Office Box 1343
Salina, Kansas 67402-1343

Carol A. Park
Assistant U. S. Trustee
501 U. S. Courthouse
401 North Market Street
Wichita, Kansas 67202

S/Sherryne M. Evans,
Secretary to:
JAMES A. PUSATERI
Bankruptcy Judge

DEED - GENERAL WARRANTY

FROM

TO

Entered in Transfer Record in my office, this 25th day of April A.D. 1983.

S/Yvonne J. Hawkins by Elaine Sidders
County Clerk

STATE OF KANSAS,
Ottawa County,

This instrument was filed for record on the 25th day of April A.D. 1983, at 8:45 o'clock A.M., and duly recorded in Book 72 of Deeds, at page 229

S/B. Martin
Register of Deeds

By_____Deputy.

Fees

Register of Deeds, for recording, $_____
County Clerk for transfer $_____
Total, $ 11.00

THIS INDENTURE, Made this 19th day of May A.D. 1982, between "Bonnie J. Clemence Trust" under the Trust Agreement dated October 20, 1978 as amended by the First Amendment thereto May 19, 1982 their successor or successors in trust of Dickinson County, in the State of Kansas of the first part, and Karen K. Clemence and Lontie J. Clemence of Dickinson County, in the State of Kansas of the second part,

WITNESSETH, That said parties of the first part, in consideration of the sum of One and 00/100 Dollars and other valuable consideration, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell and convey unto said parties of the second part, their successors and assigns, all the following-described real estate, situated in the Counties of Dickinson and

Ottawa and State of Kansas, to wit: SEE ATTACHED EXHIBIT "A" FOR DICKINSON COUNTY LEGAL TRACTS IN OTTAWA COUNTY, KANSAS: All of Section Fourteen (14), Township Ten (10) South, Range One (1) West of the 6th P.M.

All of Section Ten (10), Township Ten (10) South, Range One (1) West of the Sixth P.M.

All of Section Eleven (11), Township Ten(10) South, Range One (1) West of the Sixth P.M.

TO HAVE AND TO HOLD THE SAME, Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, forever.

And said Bonnie J. Clemence and Roy Arthur Clemence, Trustees of the "Bonnie

J. Clemence Trust" for themselves and their successors and assigns, do hereby covenant, promise and agree, to and with said parties of the second part, what at the delivery of these presents they are lawfully seized in their own right, of an absolute and indefeasible estate of inheritance, in fee simple, of and in all and singular the above granted and described premises, with the appurtenances; that the same are free, clear, discharged and unincumbered of and from all former and other grants, titles, charges, estates, judgements, assessments and incumbrances, of what nature or kind so ever, and that they will warrant and forever defend the same unto said parties of the second part their successors and assigns, against said parties of the first part, their successors and assigns and all and every person or persons,

whomsoever, lawfully claiming or to claim the same.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands, the day and year first above written.

S/Roy Arthur Clemence, Trustee of the "Bonnie J. Clemence Trust" under the Trust Agreement dated October 20, 1978 as amended by the First Amendment thereto May 19, 1982 their successor or successors in Trust.

S/Bonnie J. Clemence, Trustee of the "Bonnie J. Clemence Trust" under the Trust Agreement dated October 20, 1978 as amended by the First Amendment thereto May 19, 1982 their successor or successors in Trust.

STATE OF KANSAS, SALINE COUNTY, ss.

BE IT REMEMBERED, That on this 19th day of May, 1982, before me, the undersigned, a Notary Public in and for the County and State aforesaid, came Bonnie J. Clemence, Trustee of the "Bonnie J. Clemence Trust" and Roy Arthur Clemence, Trustee of the "Bonnie J. Clemence Trust", Trustees under the Trust Agreement dated October 20, 1978, as amended who are personally known to me to be the same persons who executed the foregoing instrument of writing, and duly acknowledged the execution of the same.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my seal on the day and year last above written.
My commission expires 3-15, 1983
S/Loren Harris

Notary Public, Saline County, KS

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